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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 1024

GENERAL CASUALTY COMPANY OF AMERICA,
A CORPORATION,
Petitioner,

vs.

THE HONORABLE KENNETH P. GRUBB, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE HONORABLE KENNETH P. GRUBB, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Earl Warren, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, General Casualty Company of America, a corporation, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, dated March 5, 1958.

OPINIONS BELOW.

The opinion of the respondent, the Honorable Kenneth P. Grubb, Judge of the United States District Court for the Eastern District of Wisconsin, in the action pending in the District Court of the United States for the Eastern District of Wisconsin, in which General Casualty Company of America, was plaintiff, and Gustave F. Keller and Helene E. Keller, were defendants, appears at pages 3-8 of the record in the United States Court of Appeals for the Seventh Circuit. The opinion was filed September 10, 1957, and is reported in 154 F. Supp. 451. A supplemental opinion, filed September 19, 1957, also appears in 154 F. Supp. 451. The supplemental opinion does not appear in the record in the United States Court of Appeals for the Seventh Circuit. A copy of such supplementai opinion of Judge Grubb is appended.

The opinion of the United States Court of Appeals for the Seventh Circuit is reported in 253 F. (2d) 53. A copy of this opinion is appended.

STATEMENT OF JURISDICTIONAL GROUNDS.

The opinion of the United States Court of Appeals for the Seventh Circuit was filed on the 5th day of March, 1958. The judgment of the United States Court of Appeals for the 7th Circuit denying the petition of General Casualty Company of America for a Writ of Mandamus directed to the Honorable Kenneth P. Grubb, Judge of the United States District Court for the Eastern District of Wisconsin, was entered by the court on the 5th day of March, 1958. This court has jurisdiction to review the judgment of the United States Court of Appeals for the Seventh Circuit by a Writ of Certiorari under the provisions of Title 28, U. S. C., Sec. 1254(1).

QUESTION PRESENTED.

Did the District Court of the United States have jurisdiction to transfer the action then pending in that court in which General Casualty Company of America, a foreign corporation, was plaintiff, and Gustave F. Keller and Helene E. Keller, were defendants, under the provisions of Title 28, U. S. C., Sec. 1404(a), upon motion of the defendants, both of whom were citizens and residents of the State of Wisconsin?

STATUTES INVOLVED.

Judge Grubb transferred the action from the Eastern District of Wisconsin to the Northern District of Oklahoma under the provisions of Title 28, U. S. C., Sec. 1404(a), which reads as follows:

> "(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

General Casualty Company of America brought the action against Mr. and Mrs. Keller in the Federal Court because of diversity of citizenship. General Casualty Company of America is a corporation organized under the laws of the State of Washington. Gustave F. Keller and Helene E. Keller, husband and wife, were citizens and residents of the State of Wisconsin.

The venue of the action brought by General Casualty Company of America against Mr. and Mrs. Keller was based upon the provisions of Title 28, U. S. C., Sec. 1391(a), which reads as follows:

> "(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside."

STATEMENT.

Petitioner, General Casualty Company of America, is a corporation organized under the laws of the State of Washington, and is licensed to transact the business of insurance in the State of Wisconsin. Gustave F. Keller and Helene E. Keller are husband and wife, are citizens of the State of Wisconsin, and reside at 5895 North Witte Lane, in the City and County of Milwaukee, State of Wisconsin.

On October 15, 1952, General Casualty Company of America had in effect a policy of automobile liability insurance issued to Gustave F. Keller, insuring him against loss or damage caused by the negligent operation of his 1950 Buick automobile.

On October 15, 1952, Mrs. Keller sustained personal injuries when she was a passenger in her husband's automobile as she and her husband were traveling on Highway 66 in the State of Oklahoma. In 1954, Mrs. Keller brought suit against her husband and others in a state court in Oklahoma to recover damages for her personal injuries. The trial of the action resulted in a judgment in favor of Mrs. Keller against the husband and others for an amount largely in excess of the policy limits of the policy issued by General Casualty Company of America. There has been an appeal to the Oklahoma Supreme Court from the judgment. The Oklahoma Supreme Court has not yet called the case for argument.

After the judgment was entered in the state court of Oklahoma, General Casualty Company of America, which was not a party to the action, brought an action in the District Court of the United States for the Eastern District of Wisconsin against Gustave F. Keller and Helene E. Keller for a declaratory judgment and alleged that Gustave F. Keller failed to cooperate in the defense of the Oklahoma state court action, and that such failure consti-

tuted a violation of the terms and conditions of the insurance policy issued by General Casualty Company of America to Gustave F. Keller.

Counsel for Gustave F. Keller and for Helene E. Keller moved to transfer the action instituted by General Casualty Company of America to the District Court of the United States for the Western District of Oklahoma. The trial court permitted counsel to amend their petition so as to request a transfer of the action to the District Court of the United States for the Northern District of Oklahoma. The motions to transfer were made under the provisions of Sec. 1404(a) of Title 28, U. S. C. The motions recited that the declaratory judgment action could have been brought in the District Court of the United States for the Northern District of Oklahoma.

The trial court in a memorandum decision held that the action could have been brought in Oklahoma and granted the motion of the defendants to transfer the action. General Casualty Company of America filed a petition for a Writ of Mandamus with the United States Court of Appeals for the Seventh Circuit, directed to the Honorable Kenneth P. Grubb, Judge of the District Court of the United States for the Eastern District of Wisconsin to compel the Judge to vacate the order transferring the action to the District Court of the United States for the Northern District of Oklahoma, and to retain jurisdiction of the action for the purpose of adjudicating the issues raised by the complaint of General Casualty Company of America. Thereafter, the United States Court of Appeals for the Seventh Circuit issued a rule to show cause why the Writ of Mandamus should not issue as prayed. The Honorable Kenneth P. Grubb, Judge of the United States District Court for the Eastern District of Wisconsin, filed a response to the rule to show cause, after which the United States Court of Appeals for the Seventh Circuit fixed a date for hearing

arguments and after the arguments were had, the court made and filed its decision denying the petition for a Writ of Mandamus.

Jurisdiction in the action brought in the District Court of the United States for the Eastern District of Wisconsin in which General Casualty Company of America was plaintiff and Gustave F. Keller and Helene E. Keller were defendants, was based on diversity of citizenship and amount. The complaint alleged that the amount in controversy exceeded $3,000, exclusive of interest and costs. The complaint further alleged that General Casualty Company of America was a corporation organized under the laws of the state of Washington, and as such was a citizen and resident of the state of Washington; that Mr. and Mrs. Keller were both citizens of the State of Wisconsin and that they resided at 5895 North Witte Lane in the City and County of Milwaukee, State of Wisconsin.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

I.

The United States Court of Appeals for the Seventh Circuit Has Decided an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by the Supreme Court of the United States.

The recent decision of the United States Supreme Court in *McGee* v. *International Life Insurance Company*, 2 L. Ed. (2d) 223, has brought into sharp focus the necessity for an authoritative decision by this court specifying the limits of jurisdiction to transfer an action from one district to another under Sec. 1404(a) of Title 28, U. S. Code. If a District Court may, upon motion of the defendants, transfer an action, as in this case, from the District Court in which the individual defendants reside to a district in which the defendants do not reside, but to which they consent to have the case transferred, "forum shopping" which has been so prevalent of late will be accelerated.

Under the decision in *McGee* v. *International Life Insurance Company*, 2 L. Ed. (2d) 223, the plaintiff may maintain an action in the state courts of the state in which he resides against a non-resident individual who has carried on business within the plaintiff's state, or who commits a tort in that state. So long as the action remains in the state court, there is no problem. The state courts will not dismiss the action on the basis of *forum non convenieus*. There is no power vested in a state court to transfer the action to a state court in another state.

In those cases where the defendant has the right to

remove the action from a state court to a federal court, a different rule will apply. Sec. 1404(a) of Title 28, U. S. C., applies to actions removed from the state court to the federal court to the same extent as if the action were originally commenced in the federal court. Secs. 1441 and 1447 of Title 28, U. S. C.; *Freeman* v. *Bee Machine Company*, 319 U. S. 448; *Grivas* v. *Parmelee Transportation Co.*, 207 F. (2d) 334, cer. den. 347 U. S. 913; *Chicago R. I. & P. R. Co.* v. *Igoe*, 212 F. (2d) 378, 382 (C. C. A. 7).

If, as the United States Court of Appeals for the Seventh Circuit has held, Sec. 1404(a) of Title 28, U. S. C., permits of the transfer of an action from the state in which the defendants reside, to a state selected by the defendants, then the uniformity which the court attempted to achieve in *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64, will be further destroyed simply because of the fortuitous circumstance that there was diversity of citizenship between the plaintiff and the defendant.

The question is not academic. *McGee* v. *International Life Insurance Company*, 2 L. Ed. (2d) 223, will result in a flood of actions being brought in states outside of New York, New Jersey, Delaware, Maryland and Ohio against corporations which have been organized under the laws of those states, and in such states where previously the plaintiffs were required to institute the actions. Typical of such actions are *Nelson* v. *Miller*, 143 N. E. (2d) 673 (Ill.), and *Sunday* v. *Donovan*, 147 N. E. (2d) 401 (Ill.).

The impact of the decision in *McGee* v. *International Life Insurance Company*, 2 L. Ed. (2d) 223, is the subject of an article by Benjamin Wham in 44 ABA Journal 422, May 1958. The same subject is treated in the March 1958 Record 139 (The Association of the Bar of the City of New York).

The problems involved in the transfer under Sec. 1404(a)

become complex because under *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, transfer from one state to another is equivalent to the transfer from a court bound to apply one body of law to another bound to apply a different body of law. Mr. Justice Jackson, in his dissenting opinion in *Wells* v. *Simonds Abrasive Co.*, 345 U. S. 514, graphically describes the effect of a transfer under Sec. 1404(a) of Title 28, U. S. Code, page 522:

> "Another very practical consideration indicates the unworkability of a doctrine for federal courts that the place of trial is the sole factor which determines the law of the case. 28 USC §1404(a) authorizes certain transfers of any civil action from state to state for the convenience of witnesses or of parties, or in the interests of justice. The purpose was to adopt for federal courts the principles of *forum non conveniens*. *Ex parte Collett*, 337 US 55, 93 L ed 1207, 69 S. Ct. 944, 959, 10 ALR 2d 921. These are broad and imprecise and involve such considerations as the state of the court's docket. *Gulf Oil Corp.* v. *Gilbert*, 330 US 501, 91 L ed 1055, 67 S. Ct. 829. Are we then to understand that parties may get a change of law as a bonus for a change of venue? If the law of the forum in which the case is tried is to be the sole test of substantive law, burden of proof, contributory negligence, measure of damages, limitations, admission of evidence, conflict of laws and other doctrines, see *Guaranty Trust Co.* v. *York*, 326 US 99, at 109, 89 L ed 2079, 2086, 65 S Ct 1464, 160 ALR 1231, then shopping for a favorable law via the *forum non conveniens* route opens up possibilities of conflict, confusion and injustice greater than anything *Swift* v. *Tyson* (US) 16 Pet 1, 10 L ed 865, ever held."

Brainerd Currie, in his article in 22 University of Chicago Law Review 405, entitled "Change of Venue and the Conflict of Laws", has called attention to the problems which will arise in the transfer of actions under

Sec. 1404(a) of Title 28, U. S. Code. Among other things, he states (page 411):

> "There is virtually no precedent in Anglo-American judicial history for change of venue from a court bound to apply one body of law to another bound to apply a different body of law."

We respectfully submit that the Supreme Court of the United States ought to pass upon the propriety of a transfer of an action brought against an individual defendant in the state in which he is a citizen and resident.

II.

The United States Court of Appeals for the Seventh Circuit Has Rendered a Decision in Conflict With the Decision of the United States Court of Appeals for the Second Circuit.

Foster-Milburn Co. v. *Knight*, 181 F. (2d) 949 (CCA 2), in which Judge Learned Hand wrote the opinion for the court, held that the doctrine of *forum non conveniens* presupposed at least two forums in which the defendant was amenable to process and that there was no reason to believe that Congress, in enacting Sec. 1404(a) intended to eliminate such prerequisite. Under that decision, since the petitioner could bring the action against Mr. and Mrs. Keller only in the District Court of the United States for the Eastern District of Wisconsin, in which district they were residents and citizens, there were not two forums in which the action could have been brought. The decision of the United States Court of Appeals for the Seventh Circuit in the case at bar holds that the consent to submit to the jurisdiction of the court confers jurisdiction to transfer the action to the court designated by the defendants. We submit that decision is contrary to the decision

of Judge Learned Hand in *Foster-Milburn Co.* v. *Knight*, 181 F. (2d) 949. See dissenting opinion of Judges Hastie and McLaughlin in *Paramount Pictures* v. *Rodney*, 186 F. (2d) 111 116-117 (CCA 3, 1950-1951).

III.

General Casualty Company of America Could Not Have Brought Its Action Against Mr. and Mrs. Keller in a District Court of the United States for the Northern District of Oklahoma and for That Reason the District Court Had No Power to Transfer the Action to the District Court of the United States for the Northern District of Oklahoma.

The decision of the United States Court of Appeals for the Seventh Circuit is that the agreement of Mr. and Mrs. Keller to submit to the jurisdiction of the District Court of the United States for the Northern District of Oklahoma made it possible for Judge Grubb to transfer the action for the reason that the action "might have been brought" in the District Court of the United States for the Northern District of Oklahoma within the meaning of that expression in Sec. 1404(a) of Title 28, U. S. C. The court cited and relied upon *Ex Parte Blaski*, 245 F. (2d) 737 (CCA 5) 1957, certiorari denied under the title *Blaski* v. *Davidson*, 355 U. S. 872, 2 L. Ed (2d) 76, 358. In effect, the court held that for purposes of transfer an action may be brought in any district to whose jurisdiction the defendant agrees to submit. We suggest that the Congress did not intend to confer such a privilege upon the defendant.

Motions made by the plaintiff to transfer an action from the forum which the plaintiff initially selected to another district have almost universally met with refusal by the

district court. The basis for the decisions has been that the action could not have been brought except in the district selected by the plaintiff and in which the defendant was a citizen and resident. *Rogers* v. *Halford*, 107 F. Supp. 295 (D. C. E. D. Wis.); *Mitchell* v. *Gunlach*, 136 F. Supp. 169 (D. C. Md.).

Judge Jones, speakini for the court in *Ex Parte Blaski*, 245 F. (2d) 737 (CCA 5), cert. den. 355 U. S. 872, 2 L. Ed. (2d) 76, 358, cites a number of district court decisions holding that even though a defendant moves for a transfer, the court has no power to grant the motion where the defendants are not subject to service in the transferee district. Judge Jones then cites one decision by the United States Court of Appeals for the First Circuit, two cases by the Second Circuit, and one case by the Third Circuit, holding that the transfer may be made upon the motion and with the consent of the defendants, even though they could not have been served with process in the transferee court. Among other things, Judge Jones said, Page 738:

> "The purpose for which Sec. 1404(a) was enacted would be unduly circumscribed if a transfer could not be made 'in the interests of justice' to a district where the defendants not only waive venue but to which they seek the transfer."

We submit that the interpretation of Sec. 1404(a) of Title 28, U. S. Code, which more nearly effectuates the intent of the Congress, is found in the opinion of Judge Whittaker, now Mr. Justice Whittaker, when he was District Judge of the District of Missouri. In *General Electric Co.* v. *Central Transit Warehouse Company*, 127 F. Supp. 817 (D. C. Mo. 1955), Judge Whittaker held that an action could not be brought within the meaning of Sec. 1404(a), Title 28, U. S. Code, in a district where the plaintiff could not obtain personal service on the defendant.

In that case, he denied a motion to transfer an action from the District Court of the United States for the District of Missouri to the Northern District of Iowa. In that case, Judge Whittaker said, page 824:

> "For these reasons, this 'action' could not have been 'brought' in the District Court of the United States for the Northern District of Iowa, and, therefore, Section 1404(a), Title 28 U. S. C. A., does not authorize, but, on the contrary, prohibits, the transfer of this action to that jurisdiction."

Finally, Judge Whittaker said, page 827:

> "We adhere to our original conclusion that a district court is without power to transfer a cause, under Section 1404(a), Title 28 U. S. C. A., to a district without statutory venue and wherein service of process could not have been had and involuntary personal jurisdiction acquired, because, under these circumstances, the action could not have been 'brought' in that district."

Judges Hastie and McLaughlin, in their dissenting opinion in *Paramount Pictures* v. *Rodney*, 186 F. (2d) 111, 117, cert. den. 340 U. S. 953, said:

> "Logically, the district where an action in personam 'might have been brought' can mean a place of proper venue for the original proceedings, or a place where the defendant was amenable to the authority of the court, or both. We are unable to find any other reasonable construction which would give the language substantial effect. The phrase under construction is treated as surplusage unless it is given one of the above suggested meanings."

We submit that the United States Court of Appeals for the Seventh Circuit in approving the transfer of the action to the Northern District of Oklahoma has emasculated the clause "where it might have been brought" in Sec. 1404(a) of Title 28, U. S. Code.

The effect of the decision of the United States Court of Appeals for the Seventh Circuit is illustrated in *Chicopee Mfg. Co.* v. *Kendall Co.*, 154 F. Supp. 248 (D. C. S. C., 1957). In that case, the plaintiff brought an action in the District Court of the United States for the Western District of South Carolina. The defendant moved to transfer the case to the United States District Court for the District of Massachusetts. The action was brought for the infringement of a patent. It appeared that the plaintiff would use nine witnesses, seven of whom resided in Florida and two in South Carolina. The defendant intended to call five witnesses from Massachusetts, one from New Jersey, one from Georgia, one from St. Paul, Minnesota and one from North Carolina. The court refused to transfer the action. Under the decision of the United States Court of Appeals for the Seventh Circuit, the trial court could have transferred the action from South Carolina to Massachusetts, New Jersey, Georgia, Minnesota and North Carolina, depending upon the desire of the defendant for a favorable forum.

We respectfully submit that a writ of certiorari should issue as prayed for.

Respectfully submitted,

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APPENDIX.

Supplemental Opinion of Judge Grubb Filed September 19, 1957 and Reported in General Casualty Company of America, a Foreign Corporation, Plaintiff v. Gustave F. Keller and Helene E. Keller, Defendants, 154 F. Supp. 451 (D. C. E. D. Wis.).

"Since the opinion was filed in this case on September 10, 1957, the court has received the advance sheet of Federal Reporter, Second Series, dated September 9, 1957, and therein (245 F. 2d 737) is printed a report of the case of Ex parte Blaski, wherein the Court of Appeals for the Fifth Circuit joins the Courts of Appeals for the First, Second and Third Circuits in the decisions cited in the September 10th opinion herein, in adopting the same rule on the question here raised."

Opinion of United States Court of Appeals.

Before FINNEGAN, HASTINGS and PARKINSON, *Circuit Judges.*

FINNEGAN, *Circuit Judge.* An automobile accident occurred on October 15, 1952 in the State of Oklahoma and Helen E. Keller, wife of Gustave F. Keller, was injured while riding as a passenger in her husband's automobile. At that time Gustave was operating the automobile and the Kellers were, and still are, citizens and residents of Wisconsin. General Casualty Company of America, petitioner in our court, a corporation organized under the laws of the State of Washington and licensed to transact business in Wisconsin had earlier issued its policy of auto-

mobile insurance, containing the usual provisions includible under Wisconsin law, to Gustave in that State. Helen sued Gustave in an Oklahoma state court during 1954 and recovered a money judgment (now on appeal to the Oklahoma Supreme Court), as compensation for her personal injuries suffered in the accident. According to the district judge, the record was (and it still is) silent as to whether General paid Helen on the judgment she recovered from Gustave.

Some time in 1957, General filed a complaint for declaratory judgment in the United States District Court, Eastern District of Wisconsin, joining Helen and Gustave as party defendants and, asking that the court find no liability under the insurance policy on the grounds Gustave breached it by his failure to cooperate with General; that the breach nullified the contract of insurance. Shortly after that Wisconsin suit was commenced, the Kellers in their respective capacities as defendants invoked § 1404 of 28 U. S. C., and successfully moved for an order of transfer from the United States District Court in Wisconsin to a named United States District Court in Oklahoma. Judge Grubb is a respondent in the original petition for mandamus now before us, because he granted the defendants' motions for transfer to Oklahoma. The district judge also denied a temporary injunction sought by General to restrain the Kellers from bringing an action on the policy in Oklahoma against General for payment of the judgment Helen took from Gustave. General's motion for injunctive relief was denied by the respondent Judge "without prejudice to the renewal of the motion in the United States District Court for the Northern District of Oklahoma." By its original petition for mandamus filed in our court General would have us direct Judge Grubb to vacate his transfer order and retain jurisdiction over the declaratory judgment action in Wisconsin. Had the motions

for transfer been denied and the declaratory judgment action retained by the district court in Wisconsin our appellate jurisdiction would be intact, but granting the motions, obviously, shifts the case, should we refuse the writ, out of our circuit; consequently we can, at least with propriety, entertain the petition for mandamus without tacitly assuming the All Writs Act (28 U. S. C. § 1651) confers independent appellate powers over interlocutory appeals. Cf. *LaBuy* v. *Howes Leather Co.*, 352 U. S. 249 (1957). Yet issuance of a writ of mandamus, even for protecting our appellate jurisdiction when the case, as here, is within the reach of the All Writs Act, remains a matter of discretion for our court. On the other hand, we are appraising discretion exercised under § 1404 by the district court and all we can do is to determine whether the respondent Judge abused it while at the same time, guarding against substituting our discretion for his.

The petition before us is all surface and articulation; it disintegrates when tested for persuasive substance. With all of the occurrence witnesses, court reporter, and local attorneys situated in Oklahoma, the respondent Judge could well, within his discretion, decide that was the place to adjudicate whether Keller cooperated—especially during the trial of the tort action—with his insurance company. General insists Wisconsin insurance law will be unused by the Oklahoma federal court. We are left to speculate, and certainly decline to hunt down reasons, why, if this view is sound, it would be of overwhelming importance; indeed if it is of moment the utter lack of showing the asserted detriment is puzzling. General's fear of another lawsuit against it in Oklahoma apparently compels this opposition to the transfer—yet it can move for injunctive relief in the transferee court—though it is obvious this worry is enhanced by ordering it to that jurisdiction where a counterclaim might be filed. By their motion to transfer

defendants have agreed to become amenable to process in Oklahoma, and we cannot say Judge Grubb abused his discretion by viewing their consent as squaring with the phrase "where it might have been brought" found in § 1404. See *Ex Parte Blaski*, 245 F. 2d 737 (5th Cir. 1957).

The petition for mandamus is denied.